Filed 6/29/09 P. v. Castillo CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY CASTILLO,

Defendant and Appellant.

F055493

(Super. Ct. No. MCR021365B)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R.S. Detjen, Judge.

Sharon Giannetta Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Rudy Castillo appeals his conviction for first degree murder. He contends the felony-murder special circumstance finding should be reversed because there was insufficient evidence he acted "'with reckless indifference to human life and as

a major participant.'" He also claims defense counsel rendered ineffective assistance by conceding during closing argument that Castillo was a major participant.

We decline to address the claim of ineffective assistance of counsel on this direct appeal, but conclude there was sufficient evidence of the felony-murder special circumstance and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Theodore Betts and Gabriel Martin lived together in a remote area of Raymond, Madera County. Martin and Betts had a large amount of marijuana at their home. On March 21, 2005, an SUV pulled into Martin and Betts's driveway. A young woman, Marissa Rubianes, was driving.

Rubianes asked Martin if he knew of an apartment or house for rent in the area. Martin said he did not and asked her to turn the car around and leave. As Rubianes started to back up, two men, Anthony Burciaga and Anthony Mendez, jumped out of the back of the SUV holding guns. Burciaga ordered Martin to keep his dog away and told Martin to walk back toward the house. Burciaga was pointing a shotgun at Martin.

When Martin, Burciaga, and Mendez got close to the house, Betts came out with a shotgun. Burciaga shoved Martin and ran toward the back of the house. Betts told Martin to go get another gun and Martin ran inside the house.

Martin was inside the house reaching for a rifle when he heard a shotgun blast coming from the back of the house. Betts came inside, stating he had been shot. Martin went outside, did not see anyone, and fired a round into the air. Martin then went inside to call 911. Betts bled to death at the scene. Burciaga and Mendez were arrested a short distance from the scene of the shooting.

On the day of the shooting, Castillo provided a statement to law enforcement. Castillo told officers that around March 2004, a friend of his had told him that he knew a man who had a lot of marijuana and that Castillo should go and get it. The friend, Bob, told Castillo that it would be easy to take the marijuana because the man who had it was

in a wheelchair, could be tied up, and no one would have to be hurt. Bob said the man had 200 to 300 pounds of marijuana on the side of his house.

About two months later in May 2004, Bob drove Castillo to the man's house to show Castillo where it was located. Later, Castillo went to the man's house by himself to be sure he remembered its location. On March 20, 2005, Castillo and Bob discussed the marijuana with Burciaga. Bob asked Castillo and Burciaga to steal the marijuana; they agreed. Castillo claimed Burciaga "took care of it from there."

On March 21, 2005, Castillo, Burciaga, and Mendez were in the SUV with Rubianes. Castillo acknowledged seeing a shotgun and pistol in the car. When they got to the Martin and Betts property, Burciaga and Mendez got out of the car. Castillo was lying down on the back seat.

Castillo heard a commotion and sat up. He saw Burciaga and Mendez walking Martin toward the house. Castillo stepped out of the car. At this point, Betts came out of the house pointing a gun. Castillo heard Martin saying, "no, no" to Betts.

Castillo then turned and ran back to the SUV. About the time Castillo climbed into the car, he heard a gunshot. Castillo told Rubianes to go and she took off as they heard a second gunshot. They drove toward Madera. Castillo had Rubianes leave him by the side of the road, where law enforcement officers picked him up.

Castillo, Rubianes, Burciaga, and Mendez were charged with murder. The special circumstance that the murder was committed in the course of a robbery was alleged. It also was alleged that Burciaga personally and intentionally discharged a firearm; Mendez personally used a firearm; and, as to Castillo and Rubianes, a principal was armed with a firearm.

The trial court severed the trials so that Burciaga and Rubianes were tried together and Castillo and Mendez were tried together.

On April 8, 2008, the jury found Castillo guilty of first degree murder and found true the special circumstance that he was a major participant and acted with reckless

disregard for human life while committing a robbery. The jury also found true the special allegation that a principal was armed with a firearm.

A jury also convicted Mendez and Burciaga of murder and the special circumstance and firearm allegation were found true as to both. Rubianes was acquitted.

Castillo was sentenced to a term of life without the possibility of parole.

DISCUSSION

I. Sufficiency of the Evidence of Special Circumstance

Because Castillo was not the killer, the People were required to prove that he acted with a reckless indifference to human life and as a major participant in order to secure a special circumstance finding. (Pen. Code, § 190.2, subd. (d).)[1] Castillo contends the evidence was insufficient to establish he was a major participant or that he acted with reckless indifference to human life.

He argues the record shows (1) he obtained information that marijuana could be taken from an old man without harming anyone; (2) he visited the location where the marijuana was stored; (3) he told Burciaga about the marijuana and Burciaga planned the robbery; and (4) he, Castillo, was not armed and did not confront Martin or Betts. Castillo acknowledges he was an aider and abettor because he provided information to Burciaga about the marijuana and went to the scene, but contends his involvement did not rise to the level of major participant and that his actions did not indicate a reckless disregard for human life.

Standard of Sufficiency of the Evidence

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v.*

[1]All further statutory references are to the Penal Code unless otherwise noted.

Virginia (1979) 443 U.S. 307, 319.) *Substantial evidence* is evidence that is "reasonable, credible, and of solid value." (*Johnson,* at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

"To determine the sufficiency of the evidence to support a special circumstance finding, we apply the same test used to determine the sufficiency of the evidence to support a conviction of a criminal offense." (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) Even if the evidence might reasonably be reconciled with the defendant's innocence, this court may not substitute its judgment for that of the trier of fact. (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304.)

Analysis

Pursuant to section 190, subdivision (d), in the absence of a showing of intent to kill, an accomplice to the underlying felony who is not the actual killer will be sentenced to death or life in prison without the possibility of parole where he or she is found to have acted with "'reckless indifference to human life and as a major participant' in the commission of the underlying felony." (*People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).) The phrases "major participant" and "reckless indifference to human life" are derived from the United States Supreme Court decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). "In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree murder who was a 'major participant' in the underlying felony and whose mental

state is one of 'reckless indifference to human life.'" (*Estrada,* at p. 575, quoting *Tison,* at p. 158 & fn. 12.)

The phrase "reckless indifference to human life" is commonly understood to mean that the defendant was subjectively aware that his or her participation in the underlying felonies involved a grave risk of death. (*Estrada, supra,* 11 Cal.4th at p. 578.) A "major participant" in a robbery is one who plays a notable or conspicuous part or is one of the more important members of the robbery group. (*People v. Proby* (1998) 60 Cal.App.4th 922, 930-931 (*Proby*).) As the United States Supreme Court has observed, the "reckless indifference" and "major participant" requirements often overlap. "[T]here are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Tison, supra,* 481 U.S. at p. 158, fn. 12.)

The United States Supreme Court has stated that the "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Tison, supra,* 481 U.S. at pp. 157-158.) Referring to and relying on *Tison*, the California Supreme Court defined the phrase "reckless indifference to human life" found in section 190.2, subdivision (d) as a "subjective appreciation or knowledge by the defendant" "of the grave risk to human life created by his or her participation in the underlying felony." (*Estrada*, 11 Cal.4th at p. 578.)

There are several cases that examine the sufficiency of the evidence as to whether an aider and abettor was a "major participant" who acted with "reckless disregard for human life" in the underlying felony for purposes of the felony-murder special

circumstance. In *People v. Bustos* (1994) 23 Cal.App.4th 1747 (*Bustos*), a codefendant claimed there was insufficient evidence he acted with reckless indifference to human life during the robbery of a woman in a restroom at the beach, where his cohort Bustos killed the woman with a knife. The codefendant entered the restroom alone and unarmed to rob the victim but knew Bustos was waiting outside with a knife. (*Id*. at pp. 1751, 1754.) Although it was Bustos who ran in and stabbed the woman when she resisted, the two men planned the robbery together and previously participated in a robbery together in another state. (*Ibid*.) Defendants fled together with the robbery proceeds, leaving the victim to die. (*Id*. at p. 1754.) The appellate court held the evidence supported the finding that the codefendant was "a major participant who acted with reckless indifference to human life." (*Id*. at p. 1755.)

In *People v. Mora* (1995) 39 Cal.App.4th 607 (*Mora*), defendant argued the felony-murder special circumstance should not apply because he did not intend for the robbery victim to be killed. The court held the felony-murder special circumstance was satisfied where the defendant helped plan the robbery and was instrumental in arranging for his coparticipant to enter the victim's home with a rifle. (*Id*. at p. 617.) When the victim was shot, defendant did not know whether he was alive or dead, but did not attempt to aid the victim. Instead, he carried through with the plan to steal and carried away the robbery proceeds, leaving the victim to die and threatening the remaining victim. (*Ibid*.)

In *Proby, supra*, 60 Cal.App.4th 922, Proby and a codefendant were both armed robbers participating in the execution of a robbery at a restaurant where the codefendant previously worked. Proby provided the guns. Codefendant shot the victim in the back of the head. Proby realized the victim was wounded but made no attempt to assist or determine if the victim was still alive. Instead, Proby and codefendant went to the safe, took the money, and left. A few days earlier, Proby and codefendant participated in a similar armed robbery, in which Proby waited outside but knew the restaurant employees

would be trapped in a walk-in freezer for several hours. The appellate court held that Proby knew of the codefendant's willingness to do violence. (*Id.* at p. 929.)

This evidence was sufficient to support the special circumstance that the murder was committed in the furtherance of a robbery, that Proby was a major participant, and that he acted with a reckless indifference to human life. (*Proby, supra,* 60 Cal.App.4th at p. 929.) The appellate court rejected Proby's argument that his involvement was more passive than the culprit in *Bustos*, who actually perpetrated the strong-armed robbery: "Nevertheless, despite these distinctions, the facts in this case still add up to [Proby's] being a major participant with a reckless indifference to human life." (*Proby,* at p. 930.)

In *People v. Hodgson* (2003) 111 Cal.App.4th 566 (*Hodgson*), the court found that the evidence of the defendant's involvement was not as extensive as the cases it had summarized, yet it found the evidence was sufficient to uphold the special circumstance. The defendant in *Hodgson* "held open the electric gate of an underground parking garage of an apartment complex to facilitate the escape of his fellow gang member who had robbed and shot to death a woman just after she opened the gate with her key card." (*Id.* at p. 568.)

The appellate court found that the defendant was a major participant, even though he did not supply the gun, was not armed, and did not personally take the property. "To begin with, this is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, appellant's role was more 'notable and conspicuous'—and also more essential—than if the shooter had been assisted by a coterie of confederates.… Because appellant was the only person assisting … in the robbery murder his actions were both important as well as conspicuous in scope and effect." (*Hodgson, supra,* 111 Cal.App.4th at pp. 579-580.)

In addition, the *Hodgson* court found that the defendant acted with reckless indifference to human life. The court stated that the defendant must have been aware that the use of a gun during a robbery presents a grave risk of death. After the victim was first

shot, the defendant did not aid the victim but instead chose to assist his fellow gang member to escape. (*Hodgson, supra,* 111 Cal.App.4th at p. 580.)

Here, the record reveals sufficient evidence to justify the jury's conclusion that Castillo acted as a "major participant" and with "'reckless indifference to human life.'" (*Estrada, supra,* 11 Cal.4th at p. 578.) Castillo told Burciaga about the marijuana. Castillo twice visited the location where the marijuana was stored in order to be sure he could locate it. Castillo discussed the robbery with Bob and Burciaga. Castillo agreed to participate in the robbery with Burciaga. Castillo was aware that Burciaga was bringing a shotgun and pistol to use in the robbery because he saw them in the SUV. After he heard shots, Castillo did not stay to render any aid, or even call for assistance after leaving.

True, Castillo's involvement appears to be less than that of the aider and abettors in *Bustos*, *Proby,* and *Mora.* Castillo ultimately did not confront Martin or Betts, and he abandoned the robbery plan and his cohorts at the first shot. But Castillo's involvement is not so insignificant, particularly in comparison to that of the defendant in *Hodgson,* that we can conclude as a matter of law that he was not a major participant. It is not the function of this court to reweigh the evidence. Our determination that the evidence supports the trier of fact's true finding ends the inquiry and resolves the issue. (*People v. Cain* (1995) 10 Cal.4th 1, 39.)

Furthermore, the evidence was sufficient for a reasonable jury to find that Castillo acted with reckless disregard for human life. Castillo knowingly agreed to participate in a robbery and, prior to arriving at Martin and Betts's residence, he knew weapons would be used during the robbery because he saw them in the SUV. Castillo had to have known that the use of weapons during robbery presented a grave risk of death. (*Hodgson, supra,* 111 Cal.App.4th at p. 580.)

II. Claim of Ineffective Assistance of Counsel

Castillo contends that his defense counsel rendered ineffective assistance when he conceded during closing argument that Castillo was a major participant. In order to establish ineffective assistance of counsel, the burden is on Castillo to show that his trial counsel's performance was inadequate when measured against a reasonably competent attorney standard *and* that it is reasonably probable a more favorable result would have been achieved but for counsel's inadequate performance. When counsel's actions or omissions result from an informed tactical choice within the range of reasonable competence, the conviction is affirmed. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 28.)

Here, as the People argued, defense counsel may have had a valid tactical reason for conceding that Castillo was a major participant. The concession may have increased his credibility with the jury on the other element, reckless disregard for human life. Hence, this contention must fail on this direct appeal.

There may be other evidence that is not before us that would lead to a conclusion that Castillo was not adequately represented. We cannot make that determination on the record before us. It is a claim that is more properly addressed in a petition for writ of habeas corpus where it can be more fully developed.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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ARDAIZ, P.J.

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VARTABEDIAN, J.